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In the Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

NANCY E. MCFADDEN
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Attorney
Department of Transportation
Washington, D.C. 20590
FRANK R. LEVI
Lieutenant, USCGR
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard
Washington, D.C. 20593
(202) 267-0272

WALTER DELLINGER
Acting Solicitor General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether judges of the military Courts of Criminal Appeals (formerly known as the Courts of Military Review) are "inferior" rather than principal officers within the meaning of the Appointments Clause.

2. Whether the judges on the Coast Guard Court of Criminal Appeals who sat on petitioners' cases were appointed in a manner consistent with the relevant statutes.

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OPINIONS BELOW

The orders of the United States Court of Appeals for the Armed Forces (Pet. App. 1a, 34a, 44a, 48a, 60a, 65a) are unreported. A prior opinion of the Court of Appeals for the Armed Forces regarding petitioner Edmond (Pet. App. 2a-11a) is reported at 41 M.J. 419. The opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) regarding petitioner Edmond (Pet. App. 12a-33a) is reported at 37 M.J. 787. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Lazenby, Leaver, and Leonard (Pet. App. 35a-43a, 45a-47a, 49a-59a) are reported at 42 M.J. 702, 42 M.J. 599, and 41 M.J. 900. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Nichols and Venable (Pet. App. 61a-64a, 66a-67a) are unreported.

JURISDICTION

The judgments of the United States Court of Appeals for the Armed Forces were entered on May 21 and June 27, 1996. The petition for a writ of certiorari was filed on August 16, 1996, and was granted on November 4, 1996. 117 S. Ct. 416. The jurisdiction of this Court rests upon 10 U.S.C. 867a and 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are set forth in an appendix to this brief: the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2; Article 66 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 866; and 49 U.S.C. 323(a).

STATEMENT

1. The Appointments Clause states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. Thus, "[t]he Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments," or by the courts. *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam).

2. The United States Coast Guard is "a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. 1. "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and * * * shall be subject to the orders of the Secretary of the Navy." 14 U.S.C. 3. "[E]xcept when operating as a service in the Navy," however, "the Coast Guard is a part of the Department of Transportation." 14 U.S.C. 1; 49 U.S.C. 108(a).[1]

The Secretary of Transportation possesses general statutory authority to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). The Secretary is also given broad authority to oversee the Coast Guard at all times when it is not operating as a service in the Navy. Thus, the Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation" and "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary of Transportation "may promulgate such regulations and orders as he deems appropriate to carry out the

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[1] The Department of Transportation was created in 1966. See Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931. Section 6(b)(1) of that Act transferred control over the Coast Guard from the Secretary of the Treasury to the Secretary of Transportation. 80 Stat. 938.

provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i).

3. Pursuant to its power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, Congress has established three tiers of military courts. See generally *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994); *Ryder* v. *United States*, 115 S. Ct. 2031, 2037-2038 (1995). At the trial level are the courts-martial. See Art. 16, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816. "A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished." *United States* v. *Weiss*, 36 M.J. 224, 228 (C.M.A. 1992), aff'd, 510 U.S. 163 (1994). See Arts. 22-24, UCMJ, 10 U.S.C. 822-824 (identifying officials who may convene courts-martial).

If the court-martial issues a conviction, the convening authority (the officer who has convened the court-martial) must review the case and take official action on it. See Art. 60, UCMJ, 10 U.S.C. 860. That officer's "authority * * * to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." Art. 60(c)(1), UCMJ, 10 U.S.C. 860(c)(1). The convening authority, "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part." Art. 60(c)(2),

UCMJ, 10 U.S.C. 860(c)(2).[2] The convening authority may also "dismiss any charge or specification by setting aside a finding of guilty thereto," Art. 60(c)(3)(A), UCMJ, 10 U.S.C. 860(c)(3)(A), or "change a finding of guilty * * * to a finding of guilty to * * * a lesser included offense," Art. 60(c)(3)(B), UCMJ, 10 U.S.C. 860(c)(3)(B).

The intermediate military courts are the four Courts of Criminal Appeals, one each for the Army, Navy-Marine Corps, Air Force, or Coast Guard. See Art. 66, UCMJ, 10 U.S.C. 866; *Weiss*, 510 U.S. at 168. The UCMJ provides that each service's Judge Advocate General "shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him." Art. 66(a), UCMJ, 10 U.S.C. 866(a).[3] In the Coast Guard, the Judge Advo-

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[2] Thus, "[t]he convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." Rules for Courts-Martial 1107(d)(1). The convening authority may not, however, increase the punishment imposed by a court-martial. *Ibid.*

[3] As first enacted in 1950, Article 66(a) of the UCMJ required the Judge Advocate General of each branch of the Armed Forces to "constitute in his office one or more boards of review," which would review the decisions of courts-martial. Act of May 5, 1950, ch. 169, 64 Stat. 128. The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(27), 82 Stat. 1341, amended Article 66(a) "by redesignating the boards as 'courts of military review' and by directing each judge advocate general to establish a single court of military review in the place of the 'one or more boards of review' provided for in the present article 66(a)." S. Rep. No. 1601, 90th Cong., 2d Sess. 14 (1968). The 1968 amendments did not change the function or power of the

cate General is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The UCMJ provides that "[a]ppellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State." Art. 66(a), UCMJ, 10 U.S.C. 866(a).[4]

The Courts of Criminal Appeals hear appeals from the decisions of courts-martial. Unless the defendant waives review, the Courts of Criminal Appeals are required to review all cases in which the sentence, as approved by the convening authority, "extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U.S.C. 866(b)(1). Review may not be waived in a case involving a sentence of death. See Art. 66(b)(2), UCMJ, 10 U.S.C. 866(b)(2). The Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the

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Boards of Review, however, or the qualifications of the persons serving on them. Effective October 5, 1994, Section 924(b) of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831, redesignated the several Courts of Military Review as Courts of Criminal Appeals.

[4] The legislative history indicates that the use of civilian judges was authorized by Congress at the request of the Coast Guard, which desired the flexibility, because of its small number of lawyers, to appoint a civilian judge to the court. See S. Rep. No. 486, 81st Cong., 1st Sess. 28 (1949) ("a provision permitting civilian members has been added for the Coast Guard"); *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1189 (1949) (quoted in *United States* v. *Weiss*, 36 M.J. at 233).

sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). "In considering the record, [the Court of Criminal Appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.*

The highest military court is the Court of Appeals for the Armed Forces (formerly known as the Court of Military Appeals, see National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2831). That court consists of five judges, Art. 142(a), UCMJ, 10 U.S.C. 942(a), "appointed from civilian life by the President, by and with the advice and consent of the Senate," Art. 142(b)(1), UCMJ, 10 U.S.C. 942(b)(1). Judges on the Court of Appeals for the Armed Forces serve fixed terms of approximately 15 years. Art. 142(b)(2), UCMJ, 10 U.S.C. 942(b)(2). The Court of Appeals for the Armed Forces exercises mandatory jurisdiction over all cases in which the Court of Criminal Appeals has affirmed a death sentence, Art. 67(a)(1), UCMJ, 10 U.S.C. 867(a)(1), and over all cases reviewed by a Court of Criminal Appeals in which the Judge Advocate General has requested further review, Art. 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2). In all other cases reviewed by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces may grant discretionary review upon petition by the defendant. See Arts. 67(a)(3), 67(b), UCMJ, 10 U.S.C. 867(a)(3), 867(b). The Court of Appeals for the Armed Forces is authorized to "take action only with respect to matters of law." Art. 67(c), UCMJ, 10 U.S.C. 867(c).

4. The Coast Guard Court of Criminal Appeals is composed of five appellate judges. The court sits in three-judge panels, with the chief judge sitting in every case unless a conflict of interest prevents his participation. The chief judge performs judicial functions as his primary duty; the four associate judges have other primary duties. See *United States* v. *Kovac*, 36 M.J. 521, 527-528 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993). The court's case load is by far the smallest of the four Courts of Criminal Appeals. During fiscal year 1995, for example, the Coast Guard Court of Criminal Appeals reviewed a total of 20 cases. *Annual Report of the Code Committee on Military Justice* 71 (Oct. 1, 1994-Sept. 30, 1995).

Four of the five current members of the Coast Guard Court of Criminal Appeals are active-duty commissioned officers in the Coast Guard. Commissioned officers in the Coast Guard are appointed by the President with the advice and consent of the Senate. 14 U.S.C. 211. The court's only current civilian member is Chief Judge Joseph H. Baum, a retired commissioned officer in the Navy who attained the military pay grade of O-6 before retirement and now serves in the civilian pay grade of GS-15. *United States* v. *Carpenter*, 37 M.J. 291, 293-295 (C.M.A. 1993), vacated and remanded, 115 S. Ct. 2572 (1995); *Kovac*, 36 M.J. at 525. Before his retirement from the court, Associate Judge Alfred F. Bridgman, Jr., a retired Coast Guard officer, also served as a civilian member of the Coast Guard Court of Criminal Appeals. See *Kovac*, 36 M.J. at 525. In 1985, the Judge Advocate General of the Coast Guard assigned Chief Judge Baum and Judge Bridgman to serve on the Coast Guard Court of Military Review. See *Kovac*, 36

M.J. at 526; Pet. Br. App. A7. On January 15, 1993, the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." Pet. Br. App. A6 (reproducing Secretary's memorandum).[5] The memorandum then listed the names of "[t]hose judges presently assigned and appointed by me," including Chief Judge Baum and Judge Bridgman. *Ibid.*; *Carpenter*, 37 M.J. at 294 n.1. The Secretary's issuance of that memorandum appears to have been precipitated by a communication from Chief Judge Baum to the Chief Counsel of the Coast Guard, expressing on behalf of the Coast Guard Court of Military Review the belief that "the Secretary, in his capacity as a cabinet level head of department, [should] reappoint the judges so the Court would be constitutionally valid beyond any doubt." *United States* v. *Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

5. In *Weiss* v. *United States*, this Court discussed the constitutional principles governing the assignment of judges to military courts. The Court first noted the parties' agreement that "military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States," 510

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[5] The General Counsel's memorandum of April 20, 1992, to which the Secretary alluded, reflected the General Counsel's last assignment of judges to the Coast Guard Court of Military Review before the January 15, 1993, memorandum. No new civilian members have joined the court since the issuance of the January 15, 1993, memorandum. Subsequent assignments of Coast Guard officers to that court have been made by the Judge Advocate General.

U.S. at 169, and that "the Appointments Clause applies to military officers," *id.* at 170. The Court concluded on that basis that "those serving as military judges must be appointed pursuant to the Appointments Clause." *Ibid.*

The petitioners in *Weiss* were United States Marines whose convictions had been affirmed by the Navy-Marine Corps Court of Military Review. 510 U.S. at 165. All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President by and with the advice and consent of the Senate. See *id.* at 170. This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 510 U.S. at 170-171, 176. The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Id.* at 172-176. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.* at 170 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)).

One Term after its decision in *Weiss*, this Court issued its decision in *Ryder* v. *United States*, 115 S. Ct. 2031 (1995). The government conceded in *Ryder* that the Judge Advocate General's appointment of civilian members to the Coast Guard Court of Criminal Appeals did not comply with the Appointments Clause. See 94-431 U.S. Br. at 9 n.9. The government argued, however, that Ryder's conviction

should be affirmed notwithstanding the defect in the civilian judges' appointments. See 115 S. Ct. at 2036-2037. This Court disagreed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Criminal Appeals. *Id.* at 2038. The Court did not address the validity of the secretarial appointments of January 15, 1993.[6]

On remand, the Court of Appeals for the Armed Forces "concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings." *United States* v. *Ryder*, 44 M.J. 9, 10 (1996). In resolving that question, the court first held that judges of the Court of Criminal Appeals were "inferior Officers" within the meaning of the Appointments Clause. *Id.* at 10-11. "Applying a functional analysis to appellate military judges," the court observed, *inter alia*, that "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction"; that military appellate judges "do not enjoy tenure"; and that those judges "may hold other positions as their primary duty and serve only part-time as appellate military judges." *Ibid.*

The court "turn[ed] next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals." 44 M.J. at 11. The court concluded that the secretarial appointments are valid, explaining that

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[6] The decision of the Coast Guard Court of Military Review in *Ryder* was issued before the secretarial appointments of January 15, 1993. See 115 S. Ct. at 2034.

"Congress has given the Secretary of Transportation broad authority in 49 U.S.C. § 323(a) to 'appoint . . . officers and employees of the Department of Transportation.' In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals." *Ibid.*

6. Each of the petitioners in this case was convicted by a court-martial. In each case the conviction and sentence were affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review). Chief Judge Baum participated in each case. Judge Bridgman participated in the appeals involving petitioners Lazenby and Leonard. See Pet. 8; Pet. App. 35a-36a, 49a-50a. The decision in each case was issued after the January 15, 1993, secretarial appointments. Pet. Br. 8. The Court of Appeals for the Armed Forces affirmed in each case, relying on its decision on remand in *Ryder*. Pet. Br. 8; see Pet. App. 1a, 34a, 44a, 48a, 60a, 65a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners challenge the statutory and constitutional authority of the Secretary of Transportation, one of the "Heads of Departments," to appoint judges to the Coast Guard Court of Criminal Appeals. That challenge should be rejected. Military appellate judges are "inferior Officers" within the meaning of the Appointments Clause who may be appointed by a "Head[] of Department[]" if Congress so specifies "by Law." The statutory scheme satisfies the Appointments Clause, because Congress has authorized the Secretary of Transportation to appoint officers within his department and because the Secretary has exercised that power to appoint the civilian judges at issue here.

I. The Constitution requires that principal officers be appointed by the President with the advice and consent of the Senate, but it permits "inferior Officers" to be appointed by, *inter alia*, "Heads of Departments." While the Court has not drawn a bright line between inferior and principal officers, the actions of the First Congress, this Court's Appointments Clause cases, and the functional approach employed in *Morrison* v. *Olson*, 487 U.S. 654 (1988), support the conclusion that judges on the Coast Guard Court of Criminal Appeals are "inferior Officers" within the meaning of the Appointments Clause.

Coast Guard appellate judges lack statutory tenure protections and may be removed from the court at any time by the Judge Advocate General, an individual who is himself subject to supervision and control by the Secretary of Transportation. The Judge Advocate General may not remove a member from the court based on disagreement with the judge's legal rulings. But that limited form of independence is characteristic of administrative adjudicators, and it has never been thought to require characterization as a principal officer. Moreover, judges on the Coast Guard Court of Criminal Appeals are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. The court's jurisdiction is confined to cases in which Coast Guard members have been convicted of violations of the Uniform Code of Military Justice.

Even in cases falling within its jurisdiction, the Court of Criminal Appeals lacks authority to mandate the outcome that it deems appropriate. The court may not increase the sentence entered by the court-

martial and approved by the convening authority, nor may it order the defendant convicted on charges for which the court-martial entered an acquittal. In addition, every decision of a Court of Criminal Appeals is subject to review by the Court of Appeals for the Armed Forces, which has plenary authority on questions of law.

Petitioners' reliance on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), is misplaced. The Court in *Freytag* did not determine whether the Chief Judge of the Tax Court is a principal officer, and, even if it had, a similar conclusion would not follow as to military appellate judges. Indeed, the judges at issue here are more closely analogous to the Tax Court's special trial judges, who were held in *Freytag* to be inferior officers.

Finally, Congress did not require that the civilian judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. This Court has *never* invalidated an Act of Congress on the ground that it provided an impermissible means of appointment of a person who was in fact a principal officer.

II. The Secretary of Transportation has broad authority to appoint officers and employees within the department, 49 U.S.C. 323(a), and he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy, 49 U.S.C. 108. The Secretary thus has ample authority to appoint judges to the Coast Guard Court of Criminal Appeals.

Article 66(a) of the UCMJ, which gives the Judge Advocate General power to "assign[]" personnel to military courts of appeals, does not divest the Secre-

tary of the authority he possesses to "appoint" a civilian judge to the Coast Guard Court of Criminal Appeals. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation, *i.e.*, a subordinate official within the Department. Because the General Counsel could be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals and because the statutory language does not expressly oust the Secretary's power, Article 66(a) should not be construed to prevent the Secretary from exercising his statutory appointment authority in the case of civilian judges. Moreover, even if this Court were to hold that the Secretary of Transportation lacks statutory authority to "appoint" to the Coast Guard Court of Criminal Appeals an individual who has not previously been "assigned" to that court by the Judge Advocate General, this Court's cases make clear that selection of an "inferior Officer" with the approval of a head of department (which took place, and was authorized by statute, here) is enough to satisfy constitutional requirements.

Recognition of the Secretary's power to appoint judges to the Coast Guard Court of Criminal Appeals, or to approve the assignments of the Judge Advocate General, furthers the purposes of the statutory scheme as a whole. The Uniform Code of Military Justice expressly provides that members of the Courts of Criminal Appeals "may be commissioned officers or civilians." Art. 66(a), UCMJ, 10 U.S.C. 866(a). If Article 66(a) were construed as divesting the Secretary of Transportation of any role in the process of selecting members of the Coast Guard Court of Criminal Appeals, the service's practical ability to utilize civilian judges would be substan-

tially impaired despite Congress's express approval of their use.

ARGUMENT

THE MILITARY APPELLATE APPOINTMENTS AT ISSUE ARE VALID UNDER THE CONSTITUTION AND APPLICABLE STATUTES

The Secretary of Transportation is one of the "Heads of Departments" within the meaning of the Appointments Clause. See 5 U.S.C. 101 (the "Executive departments" include the Department of Transportation); 49 U.S.C. 102(a) and (b) ("The Department of Transportation is an executive department of the United States Government," and "[t]he head of the Department is the Secretary of Transportation."); *Freytag* v. *Commissioner*, 501 U.S. 868, 886 (1991). The Appointments Clause thus permits Congress to vest the Secretary with the power to appoint "inferior Officers." Petitioners contend that the Secretary's appointments of judges to the Coast Guard Court of Criminal Appeals are invalid because (1) those judges are principal officers who must be appointed by the President by and with the advice and consent of the Senate (Pet. Br. 25-33), and (2) even if the judges are inferior officers whose appointment by the Secretary of Transportation would be constitutionally permissible, the Secretary lacked statutory authority to appoint them (Pet. Br. 11-25). Those contentions are incorrect.[7]

[7] We agree with petitioners (see Pet. Br. 8) that the Court need not and should not decide the constitutional question presented in this case unless it concludes that the judges at issue here were appointed in a manner consistent with the relevant statutes. We discuss the constitutional question first, however, because an understanding of the requirements of the Appointments Clause as applied to military appellate judges forms the background for understanding how the statutory scheme should be construed.

I. JUDGES ON THE COAST GUARD COURT OF CRIMINAL APPEALS ARE "INFERIOR OFFICERS" WITHIN THE MEANING OF THE APPOINTMENTS CLAUSE

A. "The Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments," or by the courts. *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam); *Freytag* v. *Commissioner*, 501 U.S. at 888-892.

While the Framers of the Constitution "provided little guidance" on where to draw the line between "inferior" and "principal" officers, *Morrison* v. *Olson*, 487 U.S. 654, 671 (1988), the actions of the First Congress in establishing the original executive departments make clear that the category of "inferior officers" is not limited to persons performing petty or insignificant duties.[8] The statutes establishing two of the three departments created during 1789 provided for the appointment of a single "principal officer"—the Secretary—and expressly authorized the Secretary to appoint an "inferior officer" who would serve

[8] As this Court has recognized, statutes "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, * * * [are] contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); see *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983).

as his second-in-command.[9] Thus, the Act creating the Department of Foreign Affairs stated:

> *Be it enacted,* * * * That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs * * *.
>
> Sec. 2. *And be it further enacted,* That there shall be in the said department an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department for Foreign Affairs, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.

Act of July 27, 1789, Sess. I, ch. 4, 1 Stat. 28-29. The statute creating the Department of War likewise

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[9] As Representative White stated:

> Who are the heads of departments? We are to have a Secretary for Foreign Affairs, another for War, and another for the Treasury; now, are not these the principal officers in those departments? They are denominated such in the bills, and in the former resolution of the House; if they are, they are the heads of those departments. But who are the inferior officers? The chief clerks, and all others who may depend upon them. These, then, are the inferior officers, whose appointments may be vested in the respective heads of departments.

1 The Debates and Proceedings in the Congress of the United States 538 (1834) (proceedings of June 18, 1789).

provided for the appointment of a single "principal officer" (the "Secretary for the Department of War") and an "inferior officer" (known as the "chief clerk"), who would be employed as the Secretary "shall deem proper," and who would "have the charge and custody of all records, books and papers" during any vacancy in the office of the Secretary. 1 Stat. 49-50.[10]

This Court's few decisions to address the issue have held a variety of subordinate officials to be inferior rather than principal officers under the Appointments Clause. See *United States* v. *Eaton*, 169 U.S. 331, 343 (1898) (vice-consuls); *Ex parte Siebold*, 100 U.S. 371, 397-398 (1879) (supervisors of elections); see generally *Morrison*, 487 U.S. at 672-673. Subordinate judicial officers were among those found to be inferior officers. See *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-353 (1931) (United States commissioners); *Reagan* v. *United States*, 182 U.S. 419, 424 (1901) (same); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (same). Although these decisions do not elaborate on the issue, they suggest that an officer who is subject to removal and supervision by an officer other than the President is generally an "inferior Officer."

This Court's decision in *Morrison* v. *Olson*, *supra*, is consistent with that view. In *Morrison*, this Court held that an Independent Counsel is an "inferior officer" whose appointment may constitutionally be vested in the "Courts of Law." 487 U.S. at 671-677.

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[10] The statute creating the Department of Treasury provided that the department would contain "[a] Secretary of the Treasury, to be deemed head of the department, a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary." 1 Stat. 65-66.

The Court declined "to decide exactly where the line falls between" principal and inferior officers, because it held that the Independent Counsel "clearly falls on the 'inferior officer' side of that line." *Id.* at 671. Although acknowledging that the Independent Counsel "possesses a degree of independent discretion to exercise the powers delegated to her" by statute, the Court found it significant that an Independent Counsel "is subject to removal by a higher Executive Branch official," *ibid.*; "is empowered * * * to perform only certain, limited duties," *ibid.*; and occupies an office that "is limited in jurisdiction," *id.* at 672.

In *Weiss* v. *United States*, 510 U.S. 163 (1994), this Court rejected an Appointments Clause challenge to the assignment of commissioned officers to serve as military judges. The Court did not specifically address the question whether miliary appellate judges are inferior officers. Its conclusion that the role of military judge is "germane" to the position of military officer, *id.* at 174-175, however, implies that both are "inferior officers." It is unlikely that all commissioned officers are "principal officers," and it would be anomalous to describe the duties of a principal officer as "germane" to those of an inferior officer. In his concurring opinion in *Weiss*, Justice Souter expressly addressed the issue. He concluded that military judges, including military appellate judges, are inferior officers. *Id.* at 192-194 (Souter, J., concurring).[11]

[11] Justice Souter asked whether military judges are principal or inferior officers because of his view that, if military judges are principal officers, the current method by which they are selected—*i.e.*, assignment to a court by the Judge Advocate General without a new appointment by the President and confirmation by the Senate—would violate the Appointments Clause. 510 U.S. at 189-191. If Justice Souter is correct that military judges would be improperly appointed if they are principal officers, a holding by this Court that the members of the Coast Guard Court of Criminal Appeals are principal officers would open to question the constitutional validity of the appointments of *all* members of the Military Courts of Criminal Appeals.

Justice Souter's conclusion is correct. Consideration of the criteria discussed in *Morrison* in light of the specific function of military appellate judges makes clear that judges of the Coast Guard Court of Criminal Appeals are inferior rather than principal officers.

1. *Removal.* Like the Independent Counsel, judges on the Coast Guard Court of Criminal Appeals are "subject to removal by a higher Executive Branch official." *Morrison*, 487 U.S. at 671. Article 66(a) of the UCMJ, 10 U.S.C. 866(a), authorizes the Judge Advocate General (the General Counsel of the Department of Transportation) to "establish a Court of Criminal Appeals," but imposes no requirement regarding the amount of time that an individual judge must be permitted to serve before giving way to his successor. As the Court of Appeals for the Armed Forces has recognized, judges on the Courts of Criminal Appeals "do not enjoy tenure and thus may be reassigned to other duties." *United States* v. *Ryder*, 44 M.J. 9, 11 (C.A.A.F. 1996). See also *Weiss* v. *United States*, 510 U.S. at 178 ("Although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition."); *id.* at 193 (Souter, J., concurring) (noting that "Court of

[Criminal Appeals] judges have no fixed term of office"); *United States* v. *Graf*, 35 M.J. 450, 460 (C.M.A. 1992) ("Congress has not provided for a fixed term of office for military trial and appellate judges."), cert. denied, 510 U.S. 1085 (1994). Cf. Rules for Courts-Martial 109(a) ("Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges.").

The judges may therefore be removed from the court by an Executive Branch official, who is himself subordinate to the Secretary of Transportation. A position from which one may be removed by a subordinate official in a department is not naturally characterized as a principal office. Petitioners, while pointing out that the Coast Guard's past practice has been to permit civilian judges to serve on the Court of Criminal Appeals for substantial periods (see Pet. Br. 28), appear to concede that judges on that court have no statutory tenure. Indeed, those judges are more susceptible to removal from their positions on the court than is an Independent Counsel, who can be removed by the Attorney General only for cause, 28 U.S.C. 596(a)(2), and who may obtain judicial review of any removal decision, 28 U.S.C. 596(a)(3).

As this Court recognized in *Weiss*, the Judge Advocate General's authority to remove military judges from their courts is not entirely unconstrained. See 510 U.S. at 181. The Court of Military Appeals in *Graf*, while making clear that military trial and appellate judges lack tenure, see 35 M.J. at 460, held that the "exercise of the power to decertify or transfer a military judge based on [the Judge Advocate General's] opinions of the appropriateness of his findings and sentences * * * violates Articles 26

and 37 of the UCMJ," *id.* at 465. Judges on the Court of Criminal Appeals are therefore "independent" (*id.* at 464) in the limited sense that they cannot be deprived of their positions based on the Judge Advocate General's disagreement with their legal rulings.

That limited form of independence is characteristic, however, of many federal adjudicative officials who have never been thought to be principal officers. It is, in particular, characteristic of administrative law judges (ALJs). As this Court has recognized, "the role of the modern federal hearing examiner or administrative law judge * * * is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U.S. 478, 513 (1978). "[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Ibid.*; see *id.* at 514 (discussing statutory provisions designed to guarantee independence of agency adjudicators); *Nash* v. *Califano*, 613 F.2d 10, 16 (2d Cir. 1980) ("The APA creates a comprehensive bulwark to protect ALJs from agency interference."). ALJs are appointed by the agencies in which they work, however, see 5 U.S.C. 3105, and they have not been thought to be principal officers. Cf. *Pennsylvania* v. *United States Dep't of Health and Human Servs.*, 80 F.3d 796, 801-806 (3d Cir. 1996) (holding that members of HHS Departmental Appeals Board are inferior officers despite Board members' performance of adjudicative functions, and despite parties' stipulation (*id.* at 802) that "Board members will serve indefinitely unless removed for misconduct"); 28 U.S.C. 631(a) and (i) (federal magistrate judges are appointed by the district courts and may be

removed by them "only for incompetency, misconduct, neglect of duty, or physical or mental disability").

2. *Duties and jurisdiction.* Judges on the Coast Guard Court of Criminal Appeals are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. As the Court of Appeals for the Armed Forces has observed, "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction," *Ryder*, 44 M.J. at 10-11, which, in the case of the Coast Guard Court of Criminal Appeals, limits its jurisdiction to Coast Guard members.

Even with respect to the cases falling within its jurisdiction, the Court of Criminal Appeals does not have plenary authority to mandate the outcome that it deems appropriate. "In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority." Art. 66(c), UCMJ, 10 U.S.C. 866(c). The court may affirm or reverse, in whole or in part, any conviction or sentence entered by the court-martial and approved by the convening authority; but it may not increase the sentence or order the defendant convicted on charges for which the court-martial entered an acquittal. The effect of the statutory scheme is, generally speaking, that a conviction or sentence can stand only if the court-martial, the convening authority, and the Court of Criminal Appeals *all* deem it to be appropriate.[12] The fact that

[12] The only exception to that rule is that a Court of Criminal Appeals decision reversing a conviction or mitigating a sentence is reviewable for legal error in the Court of Appeals for the Armed Forces. See Art. 67, UCMJ, 10 U.S.C. 867. In that respect the Court of Criminal Appeals has *less* authority to determine the ultimate disposition of the case than does the court-martial or the convening authority.

the Court of Criminal Appeals enters the process after the court-martial and the convening officer have rendered their decisions does not mean that the Court of Criminal Appeals has a greater practical impact upon the disposition of the case than do the other officials involved.

The decision of a Court of Criminal Appeals is subject, moreover, to further review by the Court of Appeals for the Armed Forces. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[13] Although the Court of Appeals for the Armed Forces reviews only a small percentage of the cases decided by the Courts of Criminal Appeals (see Pet. Br. 30), that fact is largely irrelevant to the Appointments Clause analysis. The Court of Appeals for the Armed Forces possesses the *authority* to review any decision issued by a Court of Criminal Appeals in which either the government or the defendant requests review. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[14] The fact that the court exercises that authority in only a small percentage of the cases falling within its jurisdiction does not affect the

[13] In contrast to the Court of Criminal Appeals, judges of the Court of Appeals for the Armed Forces are appointed by the President, by and with the advice and consent of the Senate, for a fixed term of approximately 15 years. See Art. 142(b)(1) and (2), UCMJ, 10 U.S.C. 942(b)(1) and (2).

[14] The court is required, moreover, to review "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review." Art. 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2).

subordinacy of the Court of Criminal Appeals within the military justice hierarchy. Indeed, the Court of Appeals for the Armed Forces has emphasized that, "[i]n the absence of a superceding statute or an intervening decision of [the Court of Appeals for the Armed Forces] or the Supreme Court of the United States," its decisions are "absolutely binding on the Court[s] of Criminal Appeals." *United States* v. *Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996).

Under the UCMJ, the Court of Appeals for the Armed Forces is authorized to "take action only with respect to matters of law." Art. 67(c), UCMJ, 10 U.S.C. 867(c). The scope of review thus exercised "is narrower than the review exercised by the Court of [Criminal Appeals]," *Ryder* v. *United States*, 115 S. Ct. 2031, 2038 (1995), which extends to questions of fact, see Art. 66(c), UCMJ, 10 U.S.C. 866(c). That disparity is insufficient, however, to justify the conclusion that judges on the Coast Guard Court of Criminal Appeals are principal officers. By permitting review for legal error of any Court of Criminal Appeals decision, Article 67 ensures that the Court of Appeals for the Armed Forces is the authoritative body for announcing rules of law in the military justice system. The assignment to subordinate courts of a greater role in determining the facts does not transform those courts into superior authorities.

Indeed, a variety of federal adjudicative officers appointed by heads of departments or by the courts are authorized by statute to issue final decisions that are reviewable under a deferential standard. Thus, decisions of the HHS Departmental Appeals Board, whose members are appointed by the Secretary, see *Pennsylvania*, 80 F.3d at 800, are reviewed under the APA standards governing challenges to agency action. See, *e.g.*, 42 U.S.C. 608(k)(2). ALJ decisions in Longshore Act cases are reviewed by the Benefits Review Board, but the ALJ's findings of fact are "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). Special masters in Vaccine Act cases are appointed by the United States Court of Federal Claims, see 42 U.S.C. 300aa-12(c)(1), and their decisions are likewise reviewable under APA standards, see 42 U.S.C. 300aa-12(e)(2)(B). Members of the Board of Veterans' Appeals are (with the exception of the Chairman) appointed by the Secretary of Veterans' Affairs "with the approval of the President," 38 U.S.C. 7101A(a), and their decisions are reviewed deferentially by the Court of Veterans Appeals, see 38 U.S.C. 7261. Federal magistrate judges are appointed by the district courts, 28 U.S.C. 631(a); they are authorized, with the consent of the parties, to conduct civil trials, see 28 U.S.C. 636(c)(1), and appeals from their judgments in such cases may be taken "in the same manner as an appeal from any other judgment of a district court," see 28 U.S.C. 636(c)(3). Despite the deference paid to the decisions of these judicial actors, none of them is regarded as a principal officer.[15]

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[15] We recognize that the division of functions between the military appellate courts and the Court of Appeals for the Armed Forces resembles in some respects the manner in which decisions of the regional courts of appeals are reviewed by this Court. Judges who serve on Article III courts, however, enjoy life tenure and protection against diminution of salary—characteristics that by themselves may qualify such judges as principal officers. History also provides substantial support for placing Article III judges in the ranks of principal officers. See *Weiss*, 510 U.S. at 191 & n.7 (Souter, J., concurring). No comparable pedigree exists for military appellate judges.

Thus, judges on the Coast Guard Court of Criminal Appeals are "inferior" to two distinct sets of governmental officers. They are subject to removal from the court at any time by the Judge Advocate General, who is in turn subordinate to the Secretary of Transportation. Their legal rulings are subject to review by the Court of Appeals for the Armed Forces, whose precedents the Courts of Criminal Appeals are obliged to follow. Insofar as they are subject to two distinct sets of superior officers, judges on the Coast Guard Court of Criminal Appeals occupy a position similar to that of many other federal adjudicative officials. See page 27, *supra*. The fact that no single official acts as their superior with respect to all aspects of their work does not alter the judges' status as inferior officers.

C. In *Freytag*, this Court upheld, against an Appointments Clause challenge, a statutory provision authorizing the Chief Judge of the Tax Court to appoint special trial judges, whom the Court found to be inferior officers. Petitioners argue that (1) the Court in *Freytag* implicitly held that the Chief Judge was a principal officer (Pet. Br. 31-32) and (2) "if judges of the Tax Court are principal officers, then the civilian and military judges of the Courts of Criminal Appeals must be in the same category" (*id.* at 32). Neither claim has merit.

Although four concurring Justices in *Freytag* concluded (consistent with the government's argument) that the Chief Judge of the Tax Court was the head of a department (see 501 U.S. at 914-922 (Scalia, J., concurring in part and concurring in the judgment)), the Court did not so hold. Rather, the Court held that the Chief Judge was authorized to appoint inferior officers on the ground that the Tax Court is one of

the "Courts of Law" within the meaning of the Appointments Clause. See *id.* at 888-892. The Court did not decide whether the "Courts of Law" to whom the appointment power is given are composed exclusively of principal officers. Cf. *Weiss*, 510 U.S. at 192-193 (Souter, J., concurring) (while Tax Court is a "Court[] of Law" under the Appointments Clause, "it may be that the Appointments Clause envisions appointment of some inferior officers by other inferior officers").

In any event, the Tax Court is not located within any executive department, and judges on that Court are provided with statutory tenure protections. See 26 U.S.C. 7443(e) ("The term of office of any judge of the Tax Court shall expire 15 years after he takes office."), 26 U.S.C. 7443(f) ("Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."); *Freytag*, 501 U.S. at 915 (Scalia, J., concurring in part and concurring in the judgment) ("the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else)"). The Coast Guard Court of Criminal Appeals, by contrast, is located within the Department of Transportation, and judges are removeable from that court by the Department's General Counsel. Thus, even if the Chief Judge of the Tax Court is assumed to be a principal officer, it does not follow that judges on the Coast Guard Court of Criminal Appeals possess the same status.

Indeed, the decision in *Freytag* undermines rather than supports petitioners' argument. The Court in *Freytag* held that the Tax Court's special trial judges

are inferior officers rather than employees. See 501 U.S. at 881-882.[16] The Court based that conclusion on the fact that "[u]nder [26 U.S.C.] §§ 7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases." *Id.* at 882. The Court observed that in those categories of cases, "special trial judges act as inferior officers who exercise independent authority." *Ibid.*[17] The Court evidently concluded that neither the performance of adjudicative functions nor the exercise of some degree of "independent authority" was a sufficient basis for holding that the special trial judges are principal officers. The judges on the Coast Guard Court of Criminal Appeals, who lack statutory tenure protections, are more closely

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[16] Petitioners in *Freytag* contended that it was "arguable that a special trial judge is a 'principal' rather than an 'inferior' officer." 90-762 Pet. Br. at 28 n.26. They observed that "[i]f a special trial judge is a principal rather than an inferior officer, reversal of the judgment below is mandated, because all principal officers must be appointed by the President with the advice and consent of the Senate." *Ibid.* Although this Court did not explicitly address the contention that the special trial judges are principal officers, it stated without qualification that those judges are inferior officers, see 501 U.S. at 881, 882, and it affirmed the judgment of the court of appeals, *id.* at 892.

[17] Although decisions of the Tax Court (including decisions of special trial judges who have been assigned to render the decision of the Tax Court) may be reviewed in the courts of appeal, they are reviewable "in the same manner and to the same extent as decisions of the district court in civil actions tried without a jury," 26 U.S.C. 7482(a)(1)—*i.e.*, their factual findings may be reversed only if clearly erroneous.

analogous to special trial judges than to the Chief Judge of the Tax Court.

D. Congress did not require that judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. See Section II, *infra*. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. That judgment should not lightly be overturned. See *Weiss*, 510 U.S. at 194 (Souter, J., concurring) ("Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause."). Indeed, this Court has *never* invalidated an Act of Congress on the ground that it provided an impermissible means of appointment of a person who was in fact a principal officer.

II. THE JUDGES WHO RULED IN PETITIONERS' CASES WERE APPOINTED IN A MANNER CONSISTENT WITH THE RELEVANT STATUTES

Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides that "[e]ach Judge Advocate General shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him." Article 66(a) also states that "[a]ppellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians." "Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the

Military Courts of [Criminal Appeals], * * * [t]hat is how the statute has been interpreted since its passage." *United States* v. *Prive*, 35 M.J. 569, 571 (C.G.C.M.R. 1992). See also *Weiss*, 510 U.S. at 169 (judges of the Courts of Criminal Appeals "are selected and assigned to serve by the appropriate Judge Advocate General") (citing Art. 66, UCMJ, 10 U.S.C. 866). In entrusting the authority to select military appellate judges to the Judge Advocates General, Congress presumably determined that the placement of a judge on a Court of Criminal Appeals does not involve an "appointment" subject to the requirements of the Appointments Clause. That inference is supported by the language of Article 66(a), which does not use the word "appointment" or "appoint," but instead refers to judges "assigned" to a Court of Criminal Appeals.

It is correct that commissioned military officers are not "appointed" within the meaning of the Constitution when they are placed on a Court of Criminal Appeals. A military officer has already received one appointment within the meaning of the Appointments Clause. As this Court held in *Weiss*, the Appointments Clause "does not require a second appointment before military officers may discharge the duties of" military judges. 510 U.S. at 176. The Constitution does not, however, permit the Judge Advocate General to assign to a military court a civilian judge who does not have an appointment conforming to the requirements of the Appointments Clause.

Petitioners contend that Article 66(a) constitutes "the exclusive means by which individuals may become members of military appellate tribunals." Pet. Br. 24. That argument, if accepted, would substantially impair the Coast Guard's ability to utilize

civilian judges on its Court of Criminal Appeals—a practice specifically authorized by Article 66(a) itself. The Judge Advocate General is not a "Head of Department." Though he may assign to military judgeships persons who have received constitutionally valid appointments to related offices, he lacks constitutional authority to appoint inferior officers. The practical consequence of petitioners' theory therefore is that civilian judges could become members of the Court of Criminal Appeals only by being first appointed to some other inferior office by the Secretary of Transportation (or by another official specified in the Appointments Clause) and then being assigned to the court by the Judge Advocate General. In our view, the relevant statutory provisions are far better harmonized by recognizing that the Secretary does have power to appoint civilian judges to the Court of Criminal Appeals. That approach facilitates the use of civilian judges in accordance with congressional intent, while avoiding the constitutional infirmity inherent in the appointment of inferior officers by the Judge Advocate General.

A. The appointments at issue here fall within the literal terms of the Secretary's statutory authority. The Secretary of Transportation is empowered to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a).[18] In addi-

[18] The Secretary has possessed that appointment authority since the creation of the Department of Transportation. See Department of Transportation Act, Pub. L. No. 89-670, § 9(a), 80 Stat. 944 (1966). As petitioners point out (Pet. Br. 22), the provision as originally enacted authorized the Secretary to appoint "such officers and employees as are necessary to carry out the provisions of this Act." 80 Stat. 944. Section 6(b)(1) of

tion to the general grant of authority over the Department as a whole, he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy. The Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary may "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i). See also *United States* v. *Washington*, 43 M.J. 840, 844 (C.G.C.C.A. 1996) (noting "the statutory position of the Secretary as the highest military justice official for the Coast Guard"). Those provisions give the Secretary of Transportation ample statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.[19]

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the 1966 Act, however, transferred the Coast Guard to the Department of Transportation and "vested in the Secretary all functions, powers, and duties, relating to the Coast Guard" that had previously been vested in the Department of the Treasury. 80 Stat. 938. Judges on the Coast Guard Court of Criminal Appeals are therefore naturally characterized as officers who are "necessary to carry out the provisions of [the Department of Transportation] Act."

[19] Petitioners argue that "if Congress provides for the appointment of an inferior officer, but assigns the power to a person not listed in the Appointments Clause, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies." Pet. Br. 11 (citing *Appointment of Assistant Assessors of*

Petitioners contend that "a catch-all appointment provision such as this does not constitute a considered judgment that any officer, let alone one as significant as a military appellate judge, should not be appointed by the usual means provided in the Constitution [*i.e.*, appointment by the President with the advice and consent of the Senate]." Pet. Br. 13; see also *id.* at 24 ("the Government's argument trivializes the office of appellate military judge by suggesting that Congress intended that civilian military judges be appointed pursuant to a catch-all provision"). Section 323(a)'s reference to "officers and employees," however, refutes petitioners' suggestion (Pet. Br. 14) that the provision should be construed to apply to "employees" alone. Cf. *United States* v. *Germaine*, 99 U.S. 508, 510 (1879) (statute prohibiting extortion by any "officer of the United States" applies only to "officers" appointed in conformity with the Appointments Clause).

There is also no requirement that Congress speak with "specificity" (Pet. Br. 14), or that it direct its attention to Section 323(a)'s potential application to a particular office (Pet. Br. 17). The Framers' "concern about excessive diffusion of power and hence accountability" (*id.* at 13) requires that the department head (or other official specified in the Appointments Clause) must accept responsibility for the appointment of an inferior officer; it does not require

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Internal Revenue, 11 Op. Att'y Gen. 209 (1865)). Petitioners' reliance on the 1865 Attorney General opinion is misplaced. That opinion makes clear that a statute authorizing a department head to appoint an inferior officer may validly be applied in the event that a different statute authorizing appointment by a subordinate is determined to be invalid. 11 Op. Att'y Gen. at 212.

that Congress must specify by name each office for which appointment authority is granted. See *Pennsylvania*, 80 F.3d at 804 (holding that 42 U.S.C. 913, which authorizes the Secretary of HHS "to appoint and fix the compensation of such officers and employees * * * as may be necessary," furnishes a sufficient statutory basis for the Secretary's appointment of Departmental Appeals Board members). So long as the pertinent statutory provisions apply by their terms to the appointments at issue here—and it is clear that they do—it is irrelevant whether Congress specifically contemplated the prospect that they would be invoked as a basis for appointment of military judges.[20]

B. Petitioners' principal statutory argument is that Section 323(a) "does not apply if the appointment of an officer is otherwise provided for by law." Pet. Br. 18. Relying on the "rule of statutory interpretation" that the specific controls the general (*id* at 14), petitioners contend that Article 66(a) of the UCMJ, 10 U.S.C. 866(a), which is addressed specifically to the establishment of Courts of Criminal Appeals, takes precedence over the general grant of appointment authority contained in Section 323(a). Pet. Br. 14. The statutory text does not support the contention

[20] Petitioners suggest (Pet. Br. 17) that it would be incongruous to conclude that appointment authority in addition to Article 66(a) exists only for Coast Guard appellate judges, and not for other branches of the military service. Yet no other branch of the Armed Forces currently uses civilian judges, see Pet. Br. 5 n.2 (noting that the Navy has done so in the past). That practice is consistent with the fact that Article 66(a)'s provision for civilian appointments originated as a response to the Coast Guard's special need for flexibility because of its small number of lawyers. See note 4, *supra*.

that the Judge Advocate General's authority under Article 66(a) to "assign[]" civilians to the Coast Guard Court of Criminal Appeals supersedes the Secretary's power to "appoint * * * officers * * * of the Department of Transportation" under Section 323(a), and the claim lacks merit as a matter of logic.

If Article 66(a) conferred appointment authority on an official outside the Secretary's control, Section 323(a) would indeed be inapplicable. Thus, as petitioners point out (Pet. Br. 17-18), Congress has required that certain officials within the Department of Transportation must be appointed by the President with the advice and consent of the Senate.[21] Other departmental officials are appointed by the Secretary "with the approval of the President."[22] With respect to those offices, we agree that the Secretary of Transportation could not circumvent the express statutory limitations on his appointment power by invoking Section 323(a) as a source of appointment authority.

In light of the subordinate position of the Judge Advocate General within the Department of Transportation, however, Article 66(a) cannot realistically

[21] See, *e.g.*, 49 U.S.C. 102(c), (d), and (e) (Deputy Secretary of Transportation, Associate Deputy Secretary of Transportation, Assistant Secretaries of Transportation, and General Counsel); 49 U.S.C. 103(b) (Federal Railroad Administrator); 49 U.S.C. 104(b)(1) (Federal Highway Administrator); 49 U.S.C. 105(b) (National Highway Traffic Safety Administrator); 49 U.S.C. 106(b) (Federal Aviation Administrator).

[22] See, *e.g.*, 49 U.S.C. 102(e) (Assistant Secretary of Transportation for Administration); 49 U.S.C. 104(b)(2) and (3) (Deputy Federal Highway Administrator and Assistant Federal Highway Administrator); 49 U.S.C. 105(b) (Deputy National Highway Traffic Safety Administrator).

be viewed as a limitation on the Secretary's appointment power. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The General Counsel is directed by statute to "carry out duties and powers prescribed by the Secretary," 49 U.S.C. 102(e), and could be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals. To read Article 66(a) as divesting the Secretary of his power to appoint military judges within the Department in that setting would make no sense. Such a construction would only be plausible if the appointing power were given to an official outside the Secretary's control. The Judge Advocate General is not such a person.

Contrary to petitioners' contention (Pet. Br. 18), our argument does not imply that the Secretary could alter the "duties and powers" of judges on the Coast Guard Court of Criminal Appeals. Section 323(a) does not permit the imposition of duties that would conflict with Article 66's specific provisions on how the court may conduct its review. See Art. 66(c), UCMJ, 10 U.S.C. 866(c). The Secretary could not, for example, direct the court to limit its scrutiny of court-martial decisions to review for legal error. The Secretary retains his Section 323(a) authority, however, absent an actual conflict between that statute and some more specific provision. In light of the General Counsel's position as the Secretary's subordinate and the language of the two provisions, no conflict exists between Article 66(a) and Section 323(a).

C. In his memorandum of January 15, 1993, the Secretary of Transportation did not purport to change the composition of the Court of Criminal Appeals or to override the Judge Advocate General's prior de-

cisions regarding its membership. Rather, the Secretary announced that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." Pet. Br. App. A6.

This Court has held that appointment of an inferior officer by a subordinate departmental official, with the express approval of the department head, is sufficient to satisfy the Appointments Clause. In *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1867), the Court held that a clerk in the Department of the Treasury was properly indicted under a federal statute prohibiting misuse of public monies by any "officer of the United States." The Court explained that the defendant

> was a public officer. The General Appropriation Act of July 23d, 1866, authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks * * *. The indictment avers the appointment of the defendant in the manner provided in the act.

Id. at 393 (footnote omitted).[23] The Court concluded on that basis that "[t]he defendant was appointed by the head of a department within the meaning of the

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[23] The indictment in the case alleged that the defendant was "a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by the assistant treasurer, with the approbation of the Secretary of the Treasury." 73 U.S. (6 Wall.) at 388 (emphasis omitted).

constitutional provision upon the subject of the appointing power." *Id.* at 393-394.[24]

Even if this Court were to determine that the Secretary of Transportation lacks statutory authority to appoint to the Coast Guard Court of Criminal Appeals an individual who has not been assigned to that court by the Judge Advocate General, the Secretary surely has authority to approve the Judge Advocate General's selection.[25] As noted above, the Secretary is authorized not only to appoint departmental officers and employees pursuant to Section 323(a), but also to "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard." 14 U.S.C. 633. "For the purpose of executing the duties and functions of the Coast Guard

[24] In its subsequent decision in *Germaine*, the Court held that a surgeon appointed by the Commissioner of Pensions was not subject to prosecution under a federal statute prohibiting extortion by an "officer of the United States." Because the Commissioner was not a "head of department" within the meaning of the Appointments Clause, the Court explained, the defendant could not properly be regarded as an "officer of the United States." 99 U.S. at 509-511. The Court distinguished *Hartwell* by noting that "[i]t is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States." 99 U.S. at 511.

[25] The Secretary's January 15, 1993, memorandum expresses an intent not simply to approve the Judge Advocate General's prior assignments of judges to the Court of Criminal Appeals, but to "adopt[]" those assignments as appointments of the Secretary. If this Court concludes, however, that the Secretary's statutory authority is limited to the approval (as in *Hartwell*) of the General Counsel's selections, the January 15, 1993, memorandum reflects such approval.

the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]." 14 U.S.C. 92(i). The Secretary's January 15, 1993, memorandum "adopt[ing]" (Pet. Br. App. A6) the Judge Advocate General's earlier assignments was authorized by those statutory provisions as well as by Section 323(a) and was sufficient, under *Hartwell*, to satisfy the requirements of the Appointments Clause.[26]

D. Recognition of the Secretary's power to appoint judges to the Coast Guard Court of Criminal Appeals, or to approve the assignments of the Judge Advocate General, furthers the purposes of the statutory scheme as a whole. In enacting Article 66(a), with the Coast Guard especially in mind, Congress expressly authorized the services to utilize civilian judges on the Courts of Criminal Appeals so that a wider pool of potential judges would possess the statutory qualifications. See note 4, *supra*. If Article 66(a) is construed as conferring upon the Judge Advocate

[26] Petitioners argue that it would be an "anomaly" (Pet. Br. 15) if the General Counsel of the Department of Transportation appointed some members of the Coast Guard Court of Military Appeals, while the Secretary of Transportation (his superior) appointed others. In actuality, the constitutional source of each member's "appointment" is not the Judge Advocate General. For commissioned officers, the appointing authority is the President, with the advice and consent of the Senate (see 14 U.S.C. 211(a)), while for civilians, it is the Secretary (see 49 U.S.C. 323(a)). We see nothing anomalous about the fact that civilian judges, who have not received commissions as military officers, must receive their appointments in a different manner. But in any event, it is clear that no anomaly exists with respect to the civilian judges at issue here, who were chosen for service by both the Secretary and the Judge Advocate General.

General exclusive authority to select members of the Coast Guard Court of Criminal Appeals, however, the Coast Guard's practical ability to utilize civilian judges will be substantially impaired. At the same time, that construction would serve no useful purpose. As noted above, the General Counsel is a subordinate official within the Department of Transportation, who could be directed by the Secretary to appoint particular individuals to the Coast Guard Court of Criminal Appeals. To permit the Secretary to exercise a more direct role in the appointment process does not deprive the Judge Advocate General of any practical authority that he would otherwise possess.

CONCLUSION

The judgments of the Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

NANCY E. MCFADDEN
General Counsel

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL M. GEIER
Assistant General Counsel for Litigation

MALCOLM L. STEWART
Assistant to the Solicitor General

PETER J. PLOCKI
Attorney
Department of Transportation

DOUGLAS N. LETTER
Attorney

FRANK R. LEVI
Lieutenant, USCGR
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard

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APPENDIX

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article 66 of the Uniform Code of Military Justice, 10 U.S.C. 866, provides:

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed in subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of [Criminal Appeals] and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of [Criminal Appeals].

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

Section 323(a) of Title 49 of the United States Code provides:

(a) The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.